ST 99-5
Tax Type: SALES TAX
Issue: Pollution Control Equipment (Exemption)

STATE OF ILINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE	)	Docket No.	96-ST-0000
OF THE STATE OF ILLINOIS	)	Reg. No.	0000-0000
	)	NTL No.	SF-199500000000000
v.	)		SF-199500000000001
	)		
"FLOWER FRESH, INC.,"	)	John E. White,	
Taxpayer	)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman appeared for the Illinois Department of Revenue, Eric Martin appeared, *pro hac vice*, for "Flower Fresh, Inc."

Synopsis:

This matter arose when "Flower Fresh, Inc." ("FFI" or "taxpayer") protested two Notices of Tax Liability ("NTL's") the Illinois Department of Revenue ("Department") issued to it following an audit of "FFI"'s business. Both NTL's assessed use tax on "FFI"'s purchases of portable toilets it used in Illinois by renting such tangible personal property to others. Pursuant to pre-trial order, the parties agreed that the issue to be resolved is whether taxpayer's portable toilets qualified as pollution control facilities, pursuant to § 2a of the Use Tax Act ("UTA"). 35 **ILCS** 105/2a.

The hearing was held on April 22, 1998, at the Department's Office of Administrative Hearings in Springfield. Following hearing, both parties submitted

written memoranda. After considering the evidence adduced at hearing, I am including in this recommendation findings of fact and conclusions of law. I recommend the matter be resolved in favor of the Department.

Findings of Fact:

1. "Tony Palovak", "FFI"'s operations manager, is licensed under the provisions of the Private Sewer Disposal Licensing Act (hereinafter "PSDLA"), 225 **ILCS** 225/1 *et seq.* Hearing Transcript ("Tr."), pp. 38 (status in "FFI"), 41 (licensed) (testimony of "Tony Palovak" ("Palovak")).[1]

2. "FFI"'s business involves renting and servicing portable sanitation units, most frequently portable toilets, and occasionally, portable hand washing stations. Tr. p. 44 ("Palovak"); Proposed Findings and Conclusions of Law and Brief Submitted by Taxpayer ("FFI"'s Brief"), p. 2 (proposed finding of fact #1).

3. The Private Sewage Disposal Code, 77 Ill. Admin Code § 905.1 *et seq.*, which is promulgated by the Department of Public Health pursuant to authority granted by § 7 of the PSDLA, 225 **ILCS** 225/7, defines a portable toilet as "a self-contained unit equipped with a waste receiving holding container." 77 Ill. Admin. Code § 905.130(e).

4. "FFI" rented and serviced portable toilets and other units in Missouri and Illinois. Tr. pp. 38, 51 ("Palovak").

5. "FFI" did not maintain records sufficient to establish the exact number of portable toilets it used in Missouri versus the number of units used in Illinois. Tr. pp. 8-10

[1] While "FFI" did not offer any documentary evidence of "Palovak"'s licensure, I take notice that persons engaged in the business "FFI" practices must be licensed pursuant to the PSDLA. 225 **ILCS** 225/4.

(testimony of Department auditor James Bernaix ("Bernaix")), 51-53 ("Palovak").[2]

6. The Department's auditor measured "FFI"'s tax base by scheduling the total amount of "FFI"'s purchases of portable toilets during the audit period, then multiplying that amount by the relative percentage of total gross receipts "FFI" received from customers in Illinois versus customers in Missouri. Tr. pp. 8-10 (Bernaix).

7. The only tangible personal property regarding which the Department measured and assessed use tax was "FFI"'s portable toilets. *Id*.; *see also* "FFI"'s Brief, p. 6; Department's Brief, p. 2.

8. Each portable toilet "FFI" rents is equipped with a waste container having a capacity of approximately 55 to 70 gallons. Tr. p. 44 ("Palovak"); *see also* 77 Ill. Admin. Code § 905.130(e).

9. "FFI" puts a formaldehyde-based chemical mixture (hereinafter referred to as "formaldehyde") into the holding tank of each portable toilet. Tr. pp. 45-46 ("Palovak"); "FFI"'s Brief, p. 2 (proposed finding of fact #4).

10. The formaldehyde suspends the naturally occurring biological decomposition of human waste by killing living organisms in the waste, which, in turn, diminishes the intensity of the odor attendant with such decomposition. Tr. pp. 30-32, 34 (testimony of "Bertrand Scalawag" ("Scalawag")); "FFI"'s Brief, p. 2 (proposed finding of fact #4); 77 Ill. Admin. Code § 905.130(e)(3) (persons servicing

[2] Because "FFI" did not have records by which the total amount of tangible personal property it purchased for use in Illinois could be determined, Bernaix, the Department's auditor, had to calculate "FFI"'s use tax base using the best available information. *See* Tr. pp. 8-10

portable toilets must "recharg[e] containers with an odor controlling solution ….").

11. The formaldehyde inhibits the natural decomposition of the waste for about a week. Tr. p. 46 ("Palovak").

12. "FFI" purchases the formaldehyde in 55-gallon drums. Tr. p. 45 ("Palovak"). "FFI" mixes the formaldehyde with water in concentrations that vary depending on the season (two gallons of formaldehyde per 500 gallons water in summer, and a 1:500 mix in winter). *Id.*

13. "FFI" pumps out the waste and waste water from its portable toilets and hand-washing stations using pump trucks. Tr. p. 45 ("Palovak"). "FFI"'s pump trucks have a 1,000 gallon waste tank, and a 500 gallon water tank for the formaldehyde. Tr. pp. 45-46; *see also* 77 Ill. Admin. Code §§ 905.130(e)(5)-(6) (service of portable toilets includes removal of waste using service trucks), 905.170(d) (vehicle construction and equipment standards for pumping trucks).

14. After pumping waste out of the toilets during service, "FFI" pours the formaldehyde into the waste container of each portable toilet. *See* Tr. pp. 45-46 ("Palovak"); 77 Ill. Admin. Code §§ 905.130(e)(3).

15. "FFI" uses the pumping or service trucks to transport the waste to a sewage treatment plant for discharge. Tr. pp. 31-32 ("Scalawag"), 44-45 ("Palovak"); "FFI"'s Brief, p. 2 (proposed finding of fact #6); *see also* 415 **ILCS** 5/3.32 (IEPA's definition of a pollution control facility includes a sewage treatment plant).

(Bernaix). "FFI" never contested the reasonableness of the Department's calculations. Tr. pp. 51-53 ("Palovak"); "FFI"'s Brief, p. 3 (proposed finding of fact #9).

16. The actual function of "FFI"'s portable toilets is to contain whatever waste is deposited into them, and to store such wastes, temporarily. *See* Taxpayer Ex. A (publication no. Z4.3-1995, published by the American National Standards Institute, Inc. Aug. 5, 1995, titled Nonsewered Waste Disposal Systems – Minimum Requirements), hand-numbered p. 5 of exhibit (defines a nonflush toilet facility as "one wherein the waste is deposited directly into a container or receptacle without flushing."); 77 Ill Admin. Code § 905.130(e).

Conclusions of Law:

Section 2a of the Use Tax Act provides:

> "Pollution control facilities" means any system, method, construction, device or appliance appurtenant thereto sold or used or intended for the primary purpose of eliminating, preventing, or reducing air and water pollution as the term "air pollution" or "water pollution" is defined in the "Environmental Protection Act", enacted by the 76th General Assembly, or for the primary purpose of treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which if released without such treatment, pretreatment, modification or disposal might be harmful, detrimental or offensive to human, plant or animal life, or to property.
>
> The purchase, employment and transfer of such tangible personal property as pollution control facilities is not a purchase, use or sale of tangible personal property.

35 **ILCS** 105/2a.

Since § 2a expressly refers to the Illinois Environmental Protection Act's ("IEPA") definitions of air and water pollution when defining pollution control facilities under the UTA, it is helpful to review those definitions here.

> "Air pollution" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to

> unreasonably interfere with the enjoyment of life or property.

415 **ILCS** 5/3.02.

> "Water pollution" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

415 **ILCS** 5/3.55.

The General Assembly also provided definitions for other terms in the IEPA, which definitions assist in the analysis and resolution of the issue in this matter. For example:

> “Contaminant” is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

415 **ILCS** 5/3.06. In Central Ill. Pub. Service Co. v. Pollution Control Board, 116 Ill. 2d 397 (1987), the Illinois supreme court deferred to the Pollution Control Board’s interpretation of the IEPA’s definition of “water pollution” to mean that “pollution occurs whenever contamination is likely to render water unusable”. 116 Ill. 2d at 409. Read together then, the definitions of air and water pollution and the definition of the word “contaminant” reveal that the legislature regarded the term “pollution” to mean the presence, in the air, land or water, of contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property. *See id.*; 415 **ILCS** 5/3.02 (air pollution), 3.06 (contaminant), 3.55 (water pollution).

The legislature also defined the following terms in the IEPA:

> "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste *into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters*, including ground waters.

415 **ILCS** 5/3.08 (emphasis added).

> "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing *into the environment*, but excludes (a) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons; (b) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine; (c) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under Section 170 of such Act; and (d) the normal application of fertilizer.

415 **ILCS** 5/3.33 (emphasis added).

> "Storage" means the containment of waste, either on a temporary basis or for a period of years, *in such a manner as not to constitute disposal*.

415 **ILCS** 5/3.36 (emphasis added).

> "Treatment" means any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any waste so as to neutralize it or render it nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

415 **ILCS** 5/3.49.

The Department argues that the tangible personal property at issue, i.e., the portable toilets, do not constitute a pollution control facility because their primary purpose is to "provide[ ] for collection and containment of human waste …." Memorandum of the Department ("Department's Brief"), p. 6. Taxpayer urges that the "uncontroverted primary purpose" of the tangible personal property at issue is to "pretreat[] … the waste pending collection so as to eliminate odor and allow safe handling for disposal". *See* Proposed Findings and Conclusions of Law and Brief Submitted by Taxpayer ("FFI"'s Brief), p. 6. Both parties agree that "FFI" bears the burden to show that the tangible personal property at issue fits the pollution control facilities exemption. Du-Mont Ventilation Co. v. Department of Revenue, 73 Ill. 2d 243, 249 (1978); "FFI"'s Brief, p. 5; Department's Brief, p. 4.

When considering claims that certain tangible personal property is a pollution control facility, the property's "primary purpose" is an objective inquiry, not a subjective one. The Illinois appellate court has described it this way: "The primary purpose test seeks to determine the function and ultimate objective of the equipment alleged to be exempt. Only those facilities directly involved in the pollution abatement process are to be afforded special tax status." Central Ill. Pub. Service Co. v. Department of Revenue, 158 Ill. App. 3d 763, 768 (4th Dist. 1987).

Here, the properties at issue are the portable toilets "FFI" is engaged in the business of renting and servicing. The evidence "FFI" offered to support its argument that the toilets "pretreated" the waste, or made it safer for disposal, however, was actually evidence regarding the function of the formaldehyde "FFI" purchased to put inside those

portable toilets. *See* Tr. p. 44-46 (“Palovak”). For example, “FFI” called “Bertrand Scalawag”, an engineer, who testified that the formaldehyde affected the biological composition of the human waste by killing living organisms inside the waste. Tr. pp. 30-32, 34 (“Scalawag”). “Scalawag” explained that that biological change reduced the odor of the waste. Tr. pp. 30-32 (“Scalawag”).

What “FFI” did not introduce, however, was evidence that factually supported “Scalawag”’s speculation that the formaldehyde “probably promoted” the safe handling of the waste, or that it “stabiliz[ed] the waste for transfer.” Tr. p. 31 (“Scalawag”). "The weight to be assigned an expert's opinion depends on the factual basis for that opinion, as an expert's opinion is only as valid as the reasons for it." Maercker Point Villas Condo. Assoc. v. Szymski, 275 Ill. App. 3d 481, 486 (3d Dist. 1995). Neither “Scalawag” nor “FFI” offered any facts to back up “Scalawag”’s opinions on those matters. *See* Tr. pp. 30-32 (“Scalawag”).

Other evidence in the record, moreover, established that whatever effect the formaldehyde had on the waste would last for only about a week, at which time the waste would be transferred, whether safe, stabilized, or not. Taxpayer Ex. A, p. 6 (Table 1 graphic (top right hand of page) shows that portable toilets shall be serviced, i.e., emptied and cleaned, at least once per week); Tr. pp. 12 (Bernaix), 46 (“Palovak”, indicating that the waste is unsafe after being stored in formaldehyde longer than one week). In sum, there was no evidence introduced at hearing that established, or even suggested, that the wastes held in the toilets, if they *were* released into the environment, would be any less harmful or offensive to people, animals, plants or to property, because of the short term

effects of the formaldehyde. 35 **ILCS** 105/2a; 415 **ILCS** 5/3.33 (definition of release); 225 **ILCS** 225/6; 77 Ill. Admin. Code § 905.170(g).

Additionally, the evidence "FFI" offered to support its argument regarding the primary purpose for its toilets primarily consisted of the conclusory opinion testimony of its witnesses. *See* Tr. pp. 24-25 ("Scalawag") (opining that "[the] primary use for the facility is for the collection and processing of human waste"), 46 ("Palovak") (answering in the affirmative to the leading question whether he had an opinion that "the primary purpose for a portable sanitation facility [was] to control the release of pollution, solid waste that may be harmful or offensive to human[s,] plants or animal life"). Ordinarily, a witness's subjective opinions regarding why or how specific items of tangible personal property are purchased and/or used are insufficient to support a determination that the property is exempt from taxation. *See* Shell Oil v. Department of Revenue, 117 Ill. App. 3d 1049, 1051 (4th Dist. 1983) (equipment whose installation was "subjectively motivated by a desire to comply with EPA [requirements]" held not entitled to § 2a's exemption); A.R. Barnes Co. v. Department of Revenue, 173 Ill. App. 3d 826, 835 (1st Dist. 1988) (mere testimony insufficient to rebut Department's *prima facie* case).

Such testimony, in fact, is to be distinguished from testimony that reflects the witness's personal knowledge regarding the actual functions of property claimed to be exempt. *See, e.g.* Wesko Plating Co. v. Department of Revenue, 222 Ill. App. 3d 422, 426 (5th Dist. 1991) (court summarizing taxpayer's president's description of how property claimed to be exempt functioned). And the insufficiency of the former type of testimony to establish the primary purpose for allegedly exempt property works both ways. For example, in Du-Mont Ventilating Co., 73 Ill. 2d at 248-49, the supreme court rejected the

Department's argument that the testimony of taxpayer's witness regarding why equipment was installed established the primary purpose for which it was intended and used. Despite that testimony, the Illinois supreme court found that the primary purpose for the equipment at issue was "to remove pollutants from the foundry and prevent their dispersal into the outside environment." *Id.*

Before I discuss the weight I gave "Palovak"'s opinion testimony regarding the primary purpose for which the portable toilets at issue were sold, used or intended, it is helpful to review his actual testimony. "Palovak" was asked the following question, and gave the following answer:

> Q: Based on your knowledge of the industry's customs and practices, and also regulations of municipalities and the local governments and the state, do you have an opinion as to whether or not the — as to whether the primary purpose for a portable sanitation facility is to control the release of pollution, solid waste that may be harmful or offensive to human[s,] plants or animal life?
> A: Well, absolutely. The main purpose of a portable restroom is so people don't urinate or use the restroom on the ground or in lakes, or in a pond or in a well or anything, and the purpose of these things is to generate a safe and, you know, bacteria–free as bacteria-free can possibly be to the public, you know, so I mean if — to give you a for instance, you know, a lot of people will call to — when you set one in front of their house during a parade they will call and say they want that thing in front. If you pick it up and somebody urinates in their front yard they are calling you right back out to put it back there. So I mean it's just an example.

Tr. pp. 46-47 ("Palovak").

Before giving that response, "Palovak" testified that he worked in the port-a-potty business for over 20 years. Tr. p. 38 ("Palovak"). That experience may well have given him the specialized knowledge sufficient to render an opinion regarding, e.g., the

standards or practices used in that business. *See* Robinson v. Greeley & Hansen, 114 Ill. App. 3d 720, 728 (2d Dist. 1983); Leonard v. Pitstick Dairy, 124 Ill. App. 3d 580, 587-88 (3d Dist. 1984) (following Fed. R. Evid. § 702, which provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert … may testify thereto in the form of an opinion or otherwise").

The transcript quoted above, however, shows that the "opinion" "Palovak" rendered was little more than his mere affirmative response to a direct question asking whether he held the specific opinion "FFI"'s attorney recited into the record. "The vice [of leading questions] lies in substituting the suggestions of counsel for the actual testimony of the witness." E. Cleary & M. Graham, Handbook of Illinois Evidence § 611.9 (6th ed. 1994). In that regard, I give little if any weight to "Palovak"'s testimony, which was being offered as substantive evidence of the ultimate fact at issue. Robinson v. Greeley & Hansen, 114 Ill. App. 3d at 728 (trier of fact determines weight to be given opinion testimony).

The question "Palovak" answered, moreover, actually asked him to comment on the primary purpose for portable toilets based on, among other things, his knowledge of the statutes and regulations pursuant to which he was licensed. *See* Tr. p. 46 ("Palovak"). No evidence, however, was offered to suggest that "Palovak" was qualified to render an opinion about what effect Illinois law had on the primary purpose for which the toilets at issue were purchased, used or intended. Nor should administrative law judges need any help to merely read the statutes and regulations that are relevant to the facts and issues in dispute in a contested case. *See* City of Bloomington v. Bloomington Township, 233 Ill.

App. 3d 724, 735 (4th Dist. 1992) (opinion testimony on a question of law should not be permitted, unless issue involves question of foreign law).

Here, I accept as true "Palovak"'s testimony that he was licensed pursuant to the PSDLA (Tr. p. 41), as well as "FFI"'s argument that it conducts business in Illinois pursuant to the provisions of that Act, and pursuant to the provisions of the Private Sewage Disposal Code ("the Code"). *See id*.; "FFI"'s Brief, p. 6 ("this is a regulated industry, with handling permitted only by licensed employees"). But I cannot accept as true "Palovak"'s opinion that the PSDLA is Illinois' "clean water act", or that the legislature passed it as a pollution control law. *See* Tr. p. 41 ("Palovak"). The Illinois General Assembly declared that it enacted that legislation to prevent disease, not pollution. 225 **ILCS** 225/2 (legislative declaration and purpose). Persons licensed under its provisions, moreover, are regulated by the Department of Public Health, and not by the Illinois Environmental Protection Agency. 225 **ILCS** 225/3-4.

I have read the applicable provisions of the PSDLA, the Code and the published industry standards introduced by "FFI". Pursuant to my reading of the construction standards for portable toilets set forth in those provisions, the actual function of the toilets at issue is to contain whatever wastes are deposited into them (77 Ill. Admin. Code § 905.130(e)(2) (standards for construction of waste containers in portable toilets); Taxpayer Ex. A, p. 5 (definition of non-flush toilet facility)), until such time as someone licensed as a private sewage pumping contractor (*see* 225 **ILCS** 225/3(11)) removes that waste and transports it for discharge into an approved facility, and ultimate disposal. 77 Ill. Admin. Code § 905.170(g).

"Scalawag", the engineer, and "FFI"'s other witness, agreed that at least part of the functions of portable toilets was to collect human waste. *See* Tr. p. 29 ("Scalawag"); "FFI"'s Brief, p. 3 (proposed finding of fact #8). Both the industry standards "FFI" offered as an exhibit, and the Code, which was promulgated pursuant to the Act under which "Palovak" testified he was licensed, provide that the actual function of a portable toilet is to contain, that is, to temporarily store, human wastes deposited in them. Taxpayer Ex. A, p. 5; 77 Ill. Admin Code § 905.130(e)(2); *see also* 415 **ILCS** 5/ 3.36 (definition of storage). Storage is not included as one of the plainly expressed pollution control functions in § 2a of the UTA. 35 **ILCS** 105/2a. I found no evidence in the record that factually supports "Scalawag"'s opinion that the toilets "probably" make the waste safer, or that the toilets themselves somehow stabilize or pretreat the waste temporarily stored inside. Tr. pp. 30-31 ("Scalawag").

The documentary evidence "FFI" introduced, moreover, flatly contradicts "Scalawag"'s opinion that the standards set forth in Taxpayer Exhibit A were promulgated for the underlying purpose of "reduc[ing] … run off or pollution that would be caused by human waste if people didn't go to the public bathrooms." Tr. pp. 22-23 ("Scalawag"). The express text of that exhibit provided that the purpose for the standards was to "assure that employees are provided with healthful and adequate sanitary waste-disposal facilities at places of employment not having sewered waste-disposal systems." Taxpayer Ex. A. p. 5 (¶ 1.2 Purpose); *see also* 225 **ILCS** 225/6. Requiring employers to provide an adequate number of washroom facilities for their employees is the underlying purpose for the standards introduced as evidence by "FFI", and not pollution control. I cannot conclude that "Scalawag"'s opinion testimony is objective evidence that rebuts

the *prima facie* correctness of the Department's determination that the toilets were subject to use tax. A.R. Barnes Co. v. Department of Revenue, 173 Ill. App. 3d at 835.

Taxpayer itself agrees that in order for tangible personal property to be considered a pollution control facility, the property must be directly used in the abatement process. *See* "FFI"'s Brief, pp. 4-5 (*citing* Central Ill. Pub. Service Co. v. Department of Revenue, 158 Ill. App. 3d at 768). The portable toilets, however, perform no function that eliminates, prevents, or reduces air and water pollution. The waste stored inside those toilets remains waste, even after being mixed with the formaldehyde. Nor do the toilets treat such waste, pretreat it, modify it or dispose of it. Storage is not the same as treatment, pretreatment, modification or disposal. *See* 415 **ILCS** 5/3.46 (storage), 3.49 (treatment), 3.08 (disposal)). Contrary to "Scalawag"'s opinion testimony (*see* Tr. pp. 25, 30 ("Scalawag"), no evidence was offered to show how the toilets themselves "process" or "stabilize" the wastes temporarily stored inside. *See* 77 Ill. Admin. Code § 905.130(e).

After "FFI" pumps out waste from its portable toilets, the evidence shows that it transports it for discharge, and later, ultimate disposal, pursuant to the requirements of the PSDLA. *See* Tr. p. 45 ("Palovak"). Whereas the American National Standards Institute prepared the standards introduced by "FFI" to provide employers with guideline to enable them to provide sufficient toilets facilities for their employees, when it wrote the PSDLA, the Illinois General Assembly declared that its purpose was to:

> … protect, promote and preserve the public health, safety and general welfare by providing for the licensing of private sewage disposal contractors and the establishment and enforcement of a minimum code of standards for design, construction, materials, operation and maintenance of private sewage disposal systems, for the transportation

> and disposal of wastes therefrom, and for private sewage disposal servicing equipment.

225 **ILCS** 225/2. The Illinois legislature sought to achieve that purpose, in part, by imposing a legal burden upon all owners of buildings and places where people live, work and assemble. Specifically, § 6 of that act provides:

> Property owners of all buildings and places where people live, work, or assemble shall provide for the sanitary disposal of all human wastes and domestic sewage. Human wastes and domestic sewage from such buildings and places shall be disposed of by discharging into a sewerage system operated and maintained under permit of the Illinois Environmental Protection Agency, if reasonably available, or *if such sewerage system is not available then such disposal shall be in compliance with this Act and the private sewage disposal code promulgated under this Act.*

225 **ILCS** 225/6.

Section 170(g) of the Code provides for the manner in which wastes from portable toilets shall be disposed. 77 Ill. Admin. Code § 170(g). In general, § 170 of the Code distinguishes between the acts of servicing, cleaning, transporting and disposing of wastes from private sewage systems, and it sets minimum standards to be followed for those separate processes. 77 Ill. Admin. Code § 170. In that respect, § 6 of the PSDLA and § 170 of the Code are consistent with the distinctions apparent within the General Assembly's definitions of "disposal," "release" and "storage" in the IEPA. That is, all of those statutes and regulations consistently provide that "disposal" occurs as or after wastes are discharged into an approved facility, or when contaminants are released into the environment — and not before. *See* 415 **ILCS** 5/3.46 (storage), 3.49 (treatment), 3.08 (disposal)); 225 **ILCS** 225/6; 77 Ill. Admin. Code § 170. In other words, the act of temporarily storing wastes is not the same as "disposing" of such wastes.

In its brief, "FFI" cites Beelman Truck Co. v. Cosentino, 253 Ill. App. 3d 420 (5th Dist. 1993), as support for its assertion that its portable toilets are component parts of an overall system which, taken as a whole, constitutes a method of eliminating or controlling pollution. "FFI"'s Brief, p. 5. Beelman requires discussion here. Beelman was decided on taxpayer's motion for summary judgment. Beelman attached to its motion an affidavit from its president containing certain factual averments relating to the nature of the primary purpose for, and to Beelman's use of, the tangible personal property claimed to be exempt from use tax. Beelman, 253 Ill. App. 3d at 421-22. The law in Illinois is clear that averments in an affidavit offered to support a motion for summary judgment will be taken as true where not controverted by counter–affidavits. *Id.*, 253 Ill. App. 3d at 426 (*citing* Blankenship v. Dialist International Corp., 209 Ill App. 3d 920, 923 (1991); *see also* Skipper Marine Electronics v. UPS, 210 Ill. App. 3d 231 (1st Dist. 1991) (*citing* Fooden v. Board of Governors, 48 Ill. 2d 580, 587 (1971)). In response to the averments submitted by the taxpayer in Beelman, the Department offered … nothing. Beelman, 253 Ill. App. 3d at 426. After the Department, in Beelman, tacitly admitted that taxpayer's tangible personal property constituted a method whose primary purpose was to reduce or control pollution, the Department was destined to take second place in that matter. *See* Beelman, 253 Ill. App. 3d at 424, 426 (citing lack of counter-affidavits to support Department's argument regarding the primary purpose of the property at issue).

Unlike the evidence presented in Beelman, however, the evidence in this case does not establish, as "FFI" contends, that the "uncontroverted primary purpose" of the toilets was to "[p]retreat[ ] ... the waste pending collection so as to eliminate odor and allow safe handling for disposal." "FFI"'s Brief, p. 6. I have already attempted to

describe why the opinion testimony "FFI" offered at hearing did not constitute objective evidence showing that its toilets actually function as pollution control facilities. *See*, *supra*, pp. 9-14; A.R. Barnes Co. v. Department of Revenue, 173 Ill. App. 3d at 835. The books and records "FFI" did introduce at hearing, moreover, do not corroborate its argument that the portable toilets are entitled to the exemption. *See* Taxpayer Exs. A-B; A.R. Barnes Co. v. Department of Revenue, 173 Ill. App. 3d at 835. Finally, "FFI"'s argument seems to suggest that when the General Assembly passed a provision ostensibly to "encourage efforts to control pollution by providing a tax exemption for the employment of pollution control facilities" (*see* Wesko Plating Inc., 222 Ill. App. 3d at 426), it really intended to grant a blanket exemption to any purchase, use or sale of ordinary plumbing fixtures. *See* "FFI"'s Brief, p. 5 (responding that the Department's assertion that conventional toilets, urinals, dishwashers, sinks, washing machines and other similar fixtures have never been considered to be pollution control facilities, was "not supported by … law ….").

The crux of this matter, I believe, lies in deciding whether tangible personal property whose actual function is to temporarily contain or store contaminants or other potential pollutants fits into § 2a's definition of tangible personal property that is "sold or used or intended for the primary purpose of … preventing, or reducing … pollution." 35 **ILCS** 105/2a. The only case I am aware of in which an Illinois court was called upon to decide whether storage facilities were part of "a system, or appliance appurtenant thereto … intended for the primary purpose of reducing … pollution" is Shell Oil v. Department of Revenue, 117 Ill. App. 3d 1049 (4th Dist. 1983).

Shell actually involved three different items of tangible personal property: smokestacks, two large storage tanks, and property used to make modifications in Shell's refinery fuel system. Shell Oil, 117 Ill. App. 3d at 1050. All of the property at issue, however, was purchased and the equipment constructed as a direct result of the Environmental Protection Agency's notification to Shell that it was emitting too much sulphur at the refinery. Shell Oil, 117 Ill. App. 3d at 1051-52. The record the court reviewed and considered included testimony by Shell's engineer regarding the purpose for, and specific nature of, those changes. 117 Ill. App. 3d at 1052.

Even though it accepted the evidence Shell offered to show why it built the storage tanks, the court held that:

> The revision in the refinery fuel system and the construction of the asphalt storage tanks, however, were neither appurtenant to any pollution control facilities nor did they have as their primary purpose the elimination, reduction or prevention of air pollution. Although these changes were subjectively motivated by a desire to comply with EPA sulphur emissions at plaintiff's refinery, their predominant purpose was to enable plaintiff to produce asphalt from high sulphur pitch and burn the low sulphur pitch as fuel in the refinery. Our opinion in *Illinois Cereal Mills* clearly eschewed any reliance on a subjective purpose test as a basis for determining the "primary purpose" of alleged pollution control equipment. As we noted in that opinion: "The words in section 2a, 'sold or used or intended for the primary purpose of' reducing or eliminating certain types of pollution does not seem to refer to equipment like the gas fired boilers *even though they were installed because they were less polluting than the equipment formerly used.*" (Emphasis added.) [citation omitted] We affirm the judgment of the trial court determining that the stacks were tax exempt but reverse that judgment upon the exemption accorded the storage tanks and the fuel system.

Shell Oil, 117 Ill. App. 3d at 1051 (emphasis original).

The court in Shell would not read § 2a so broadly as to extend the exemption to all items of tangible personal property whose function was to temporarily hold, store or somehow touch potential pollutants or contaminants, but which items of property did not actually have, as their primary purpose, the prevention or reduction of pollution. Here, and even though owners of places where people work, live and assemble are required by Illinois law to provide alternative means of arranging for the disposal of human wastes where conventional sewer systems are not available (225 **ILCS** 225/6), I cannot conclude that the toilets at issue should be considered exempt under § 2a of the UTA because they do not have, as their primary purpose, the prevention or reduction of pollution. *See* Shell Oil, 117 Ill. App. 3d at 1051.

Conclusion:

The subjective purpose for which "FFI" uses the toilets (i.e., by leasing them to others) in Illinois is, presumably, to make a profit in the business in which it is engaged. *See* Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 310 (1965) (the right or power exercised by a lessor incident to its ownership of the property it leases "is the right or power to lease the property in an attempt to make a profit."). The objective primary purpose for which customers use "FFI"'s services, including its portable toilets, is to provide the required restroom facilities for people where there are no, or not enough, sewered facilities available. *See* Taxpayer Ex. A, p. 5 (¶ 1.2 Purpose); Taxpayer Ex. B (request for proposal of bids for lease and service of portable toilet at Illinois state fair, including minimum number of units, and frequency of service); 225 **ILCS** 225/6. Under Illinois law, that is a public health function, and not a pollution control function. *See* 225 **ILCS** 225/2, 225/6.

I conclude that "FFI"'s portable toilets were not actually used or intended for the primary purpose of eliminating, preventing, or reducing air and water pollution, or for the primary purpose of treating, pretreating, modifying or disposing of any potential pollutant, which, if released without such treatment, pretreatment, modification or disposal, might be harmful, detrimental or offensive to human, plant or animal life, or to property. Instead, the primary function of "FFI"'s portable toilets, and the primary purpose for which those toilets are sold, used or intended, is to contain and temporarily store whatever wastes are deposited inside them.

For all of the foregoing reasons, I recommend the Director finalize the NTL's as issued, with interest to accrue pursuant to statute.

John White
Administrative Law Judge

Date: 3/31/99